85-2088

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROGER'S TERMINAL AND SHIPPING CORPORATION,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS,
DEPARTMENT OF LABOR AND EMILE SMITH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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60 pp

QUESTIONS PRESENTED*

1. Under the Longshore and Harbor Workers' Compensation Act (33 U.S.C.A. § 901 *et seq.*) may a presumption of "total and permanent disability" be allowed to arise and burden the employer upon mere proof by the employee of inability by that claimant to return to one type of former employment, in the face of admission by the claimant and his physicians of ability to perform many other types of employment? Stated differently, does the Act by its terms allow a presumption of "total disability" to arise based solely and merely upon proof of some "disability" which is far less than "total" in nature, and is the goal of LHWCA to rehabilitate injured workers and return them to productive employment frustrated thereby?

2. (a) Wnether the employer is responsible for the payment of medical treatment given by a doctor chosen by the employee where the employer has previously provided medical care to the employee where the employee fails to give timely notice of the treatment, and where the doctor chosen is not approved by the Secretary, as required by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 *et seq.*

(b) Whether the employer is responsible for the pay-

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* Petitioner, Roger's Terminal and Shipping Corp., is a wholly-owned subsidiary of Cargill, Inc., a privately-owned corporation. Cargill Inc. has other wholly-owned subsidiaries that are affiliated to Roger's Terminal and Shipping Corp., but the ownership of these companies lies solely with the private investors of Cargill, Inc. Petitioner has no subsidiaries.

ment of surgical expenses when the employee is seeing a physician or surgeon without the knowledge or consent of the employer or the deputy commissioner, where the employer is not aware of the performance of surgery prior to its occurrence, and where the surgeon is not approved by the Secretary to render medical care?

(c) Whether, when a claimant changes physicians without first obtaining the prior consent of the employer or the Deputy Commissioner as required by the Longshore and Harbor Workers' Compensation Act, the employer is obligated to reimburse the employee for the expenses of the second physician.

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DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, DEPARTMENT OF LABOR AND EMILE SMITH
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Roger's Terminal and Shipping Corporation petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, 1a-14a) is reported at 784 F.2d 786. The opinion of the Benefits Review Board (App. B, infra, 15a-19a) is not reported.

The decision and order denying the petition for rehearing of Michaelle F. Pitard, Administrative Law Judge, (App. C, infra 20a-22a) is not reported. The

decision and order awarding benefits of Michaelle F. Pitard, Administrative Law Judge, (App. D, infra, 23a-33a) is also not published.

JURISDICTION

The judgment of the Court of Appeals was entered on March 12, 1986. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 2101(c).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 2(10) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. § 902(10), defines "disability" in the following manner:

> "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

2. Section 7(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 907(b), provides in pertinent part as follows:

> The employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care under this chapter as hereinafter provided. . . . Change of physicians at the request of employees shall be permitted in accordance with regulations of the Secretary.

3. Section 7(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. § 907(c), described the physicians authorized to render medical care under the Act:

> The Secretary may designate the physicians who are authorized to render medical care under the chapter. The names of physicians so designated in the community shall be made available to employees through posting or in such other form as the Secretary may prescribe.

4. Section 7(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. § 907(c), as amended by Pub.L. 98-426, Section 7(b), reads in pertinent part as follows:

> The Secretary shall annually prepare a list of physicians and health care providers in each compensation district who are *not* authorized to render medical care or provide medical services under this chapter.

5. Rule 702.403 of the Regulations Governing the Administration of the Longshore and Harbor Workers' Compensation Act, 20 C.F.R. 702.403, provide in relevant part:

> The employee shall have the right to choose his/her attending physician from among those authorized by the Director, OWCP, to furnish such care and treatment . . .

6. Section 7(d) of the Longshore and Harbor Workers'Compensation Act, 33 U.S.C.A. § 907(d), dealing with the procedures which an employee must follow in order to recover medical expenses incurred by him, provided in pertinent part as follows:

> An employee shall not be entitled to recover any amount extended by him for medical or other treatment or services unless he shall

> have requested the employer to furnish such treatment for services, or to authorize provision of medical or surgical services by the physician selected by the employee, and the employer shall have refused or neglected to do so, or unless the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize the same; nor shall any claim for medical or surgical treatment be valid and enforcable, as against such employer, unless within ten days following the first treatment the physician giving such treatment furnish to the employer and the Secretary a report of such injury and treatment, on a form prescribed by the Secretary.

7. Section 7(d) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. § 907(d), as amended by Pub.L. 98-426, Section 7(c), provides in pertinent part as follows:

> An employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless the employer shall have refused or neglected a request to furnish such services and the employee has complied with subsections (b) and (c) of this section and the applicable regulations.

8. Rule 702.421 of the Regulations Governing the Administration of the Longshore and Harbor Workers' Compensation Act, 20 C.F.R. 702.421, reads in relevant part as follows:

> An employee shall not be entitled to recover for medical services and supplies unless the employer shall have refused or neglected a request to furnish such services and the employee has complied with sections 7(b) and (c) of the Act, 33 U.S.C. §§ 907(b) and (c), and these regulations.

9. Rule 702.406 of the Regulations Governing the Administration of the Longshore and Harbor Workers' Compensation Act, 20 C.F.R. 702.406 provides the rule for the change of physicians:

> Whenever the employee has made his initial, free choice of an attending physician, he may not thereafter change physicians without the prior written consent of the employer (or carrier) or the deputy commissioner. Such consent shall be given in cases where an employees initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for change.

STATEMENT OF THE CASE

On May 21, 1978, Emile Smith slipped and fell while loading grain into the hold of a ship during the course and scope of his employment with Roger's Terminal and Shipping Corporation, thereby injuring his back. Pursuant to his employer's authorization, Smith received emergency care at St. Charles General Hospital in New Orleans, where he was treated and released to return to work. On June 9, 1978, the claims

adjuster for Roger's Terminal made an appointment for Smith to be examined by Dr. John Garoutte, an orthopedic surgeon, on June 16, 1978. The claimant missed this appointment with Dr. Garoutte, and instead went to see Dr. Vernon Kroll, to whom Smith was referred by his attorney.

A second appointment was set with Dr. Garoutte by the claims adjuster for July 17, 1978, which appointment claimant attended. Dr. Garoutte determined that Smith was suffering from chronic lumbar strain, and noted his agreement with Dr. Kroll that conservative treatment was warranted at that time.

Dr. Kroll referred Emile Smith to Dr. Donald E. Richardson, a neurosurgeon. On July 21, 1978 Dr. Richardson examined Emile Smith. Dr. Richardson waited approximately ten days before completing his medical report on this examination and sent a copy of the medical report to Raymond Haller, the claims adjuster, on August 1, 1978, recommending therein that Smith undergo a lumbar myelogram. The adjuster received a copy of this report on August 2, 1978. In the meantime and prior to the preparation of his medical report, Dr. Richardson admitted Smith to the Southern Baptist Hospital on July 30, 1978 and performed a lumbar myelogram. A lumbar laminectomy with the removal of the L-5 disc was performed on August 3, 1978. Raymond Haller, the adjuster was not aware of this surgery until August 22, 1978.

Dr. Richardson discharged Emile Smith on November 24, 1978 after having determined that Smith had reached maximum medical improvement. Dr. Richardson concluded that Smith had an estimated disability of fifteen to twenty percent of the body as a whole on a partial permanent basis and that Smith

should not do work requiring heavy lifting of more than seventy-five to one hundred pounds, or repeated bending.

Dr. Garoutte reevaluated Smith on February 12, 1979 and was of the opinion that Smith had a twenty percent permanent *partial* disability of the lumbar spine and was not capable of returning to work as a longshoreman but was capable of engaging in other types of employment.

During the hearing before the Administrative Law Judge, the parties agreed that Smith would be evaluated by Dr. John F. Schuhmacher, a neurologist and neurosurgeon. Dr. Schuhmacher concluded that Smith had a five to ten percent permanent physical impairment to the body as a whole. Dr. Schuhmacher also concluded that Emile Smith was capable of performing gainful employment as long as claimant avoided repetitive lifting or pushing of weights in excess of seventy-five pounds.

At the hearing before the Administrative Law Judge, Emile Smith testified concerning the various jobs he had applied for in the Natchez, Mississippi area, where he had moved after his injury. In the two years subsequent to his accident, Emile Smith had made only three job inquiries, all in the Natchez area. He did not fill out an application form at any of these job sites. When talking to the prospective employers, Smith told them that he was totally incapable of lifting *anything* rather than disclosing his true limitation of seventy-five to one hundred pounds.

Emile Smith testified that he had not looked for any light or sedentary work in either Natchez, Mississippi or New Orleans, Louisiana, where he was

working at the time of his accident. Claimant also stated that he had not checked with his union to see if any employment was available through that means. *Smith further testified that he was not capable of working as a longshoreman, but admitted that he was capable of performing other types of employment.*

The Administrative Law Judge found Emile Smith unable to return to his prior employment as a longshoreman and then held that Smith had thus *ipso facto* established a *prima facie* case of permanent total disability, thereby shifting the burden to Roger's Terminal to prove the availability of job opportunities for Smith. At that time, counsel for Roger's Terminal pointed out to the Administrative Law Judge the general availability in the New Orleans and Natchez areas of light and sedentary jobs through the introduction of the classified ads section of the local newspaper. The ALJ concluded that Rogers Terminal failed to meet its burden of proof, concluded that Smith was permanently and totally disabled, and determined that Rogers Terminal was liable for all the medical expenses that were incurred as a result of Smith's injury. The Benefits Review Board affirmed the decision of the ALJ. The United States Court of Appeals for the Fifth Circuit affirmed the decision of the Benefits Review Board.

The basis for Federal jurisdiction in the court of first instance is 33 U.S.C.A. § 901, *et seq*, the Longshore and Harbor Workers' Compensation Act, and 28 U.S.C.A. § 1331.

REASONS FOR GRANTING THE PETITION

Petitioner submits (1) that in this case the United States Court of Appeals for the Fifth Circuit has

decided federal questions of great substance not heretofore specifically determined by this Court, and (2) that the Court of Appeals has interpreted the term "permanent total disability," and has fashioned a burden of proof and evidentiary presumption related thereto in a way which is not in accord with and not based upon any applicable or existent provisions of the LHWCA.

1. The Federal Questions Herein Have Not Heretofore Been Specifically Determined by This Court

a. The Fifth Circuit Has Created an Evidentiary Presumption of "Total and Permanent Disability" Which is Not Sanctioned by the LHWCA and Which Frustrates the Policy and Goals of That Act

The principal issue in this case has not been addressed by this Court.

The crucial question involved in this case is: What showing must a claimant make in order to establish a *prima facie* case of permanent and total disability under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. § 908(a)? Under the Longshore and Harbor Workers' Compensation Act (33 U.S.C.A. § 901 *et seq.*) may a presumption of "total and permanent disability" be allowed to arise and burden the employer upon mere proof by the employee of inability by that claimant to return to one type of former employment, in the face of admission by the claimant and his physicians of ability to perform many other types of employment? Stated differently, does the Act by its terms allow a presumption of "total disability" to arise based solely and merely upon proof of some "disability" which is far less than "total" in nature, and is the goal of LHWCA to rehabilitate injured

workers and return them to productive employment frustrated thereby?

At the hearings before the Administrative Law Judge, Emile Smith presented evidence tending to prove that he was unable to return to his former occupation as a longshoreman. However, Smith introduced no expert testimony to show that he was disabled to such an extent as to be unable to perform any other type of gainful employment. In fact, claimant testified that there were certain jobs which he was able to perform in his present condition. Smith also related his non-diligent attempts to procure other employment after his injury. He testified that in the two years following his accident, he had made only three employment inquiries in the Natchez, Mississippi area. He did not fill out a single job application at any of these job sites. When talking to the prospective employers, Smith may have misstated his medical condition by telling the foremen that he was totally incapable of lifting *anything*, rather than items weighing over seventy five to one hundred pounds.

Smith testified that he had not looked for any light or sedentary work in the Natchez or New Orleans area and that he had not checked with his union to determine the availability of other types of work.

The medical reports of Drs. Garoutte, Richardson, and Schuhmacher were introduced into evidence at the hearing. Dr. Garoutte assessed Smith's disability as a twenty percent permanent partial disability of the lumbar spine, and was of the opinion that Smith was not capable of performing longshoreman duties, but could do other types of work. Dr. Richardson concluded that Smith had an estimated disability of fifteen to twenty percent of the body as a whole on

a partial permanent basis and that Smith could engage in work which did not require heavy lifting of more than seventy-five to one hundred pounds, or repeated bending. Dr. Schuhmacher, the neurologist/neurosurgeon who examined claimant at the behest of the ALJ and by joint agreement of the parties, concluded that Smith had a five to ten percent whole man physical impairment and that Smith was capable of engaging in gainful employment other than work involving repetitive lifting of more than seventy-five pounds.

In short, the general consensus of these doctors was that Emile Smith was capable of performing gainful employment. None of the doctors were of the opinion that Emile Smith's physical condition was so incapacitating as to render him unable to engage in any remunerative work. Emile Smith himself did not assert that his physical condition and limitations prevented him from engaging in employment other than as a longshoreman. In fact, counsel for claimant classified Smith's degree of disability to the ALJ by stating, "I would think that the proper category to put him in would be permanent *partial* disability." (Transcript - ALJ's Hearing, p. 15)

The Administrative Law Judge determined that Smith was unable to return to his occupation as a longshoreman and held that Smith had established a *prima facie* case of permanent total disability under the Longshore and Harbor Workers' Compensation Act, thereby shifting the burden to Roger's Terminal to demonstrate the existence of jobs available for Smith.

The Benefits Review Board and the Fifth Circuit Court of Appeals affirmed the ALJ's decision, holding

that once a claimant establishes that he cannot perform his former job because of a job-related injury, it is presumed that he is permanently and totally disabled. This statement of the law overlooks the policy of the Longshore and Harbor Workers' Compensation Act and misconstrues its provisions and should be reversed by this Court.

Disability under LHWCA is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment," 33 U.S.C.A. § 902(10). No standard is provided in the Act to determine the extent of disability and to distinguish between total permanent, permanent partial, temporary total and temporary partial disability. The statutory scheme does provide for different amounts of compensation based on the extent and permanence of the disability. 33 U.S.C.A. §§ 908(a),(b),(c), and (d); *Trans- State Dredging v. Benefits Review Board*, 731 F.2d 199 (4th Cir. 1984); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031(5th Cir. 1981); *Odom Const. Co. v. U.S. Dept. of Labor*, 622 F.2d 110 (5th Cir. 1980); *Newport News v. Director, OWCP*, 592 F.2d 762 (4th Cir. 1979); and *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978).

Petitioner does not seek review of the Fifth Circuit Court of Appeals' ruling in this case insofar as the Fifth Circuit held that once Emile Smith proved he was unable to perform his former job, he was presumed to be "disabled" to some degree. This clearly is in line with the definition of "disability" contained in LHWCA of an "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other em-

ployment," and with the consistent interpretation of the term by the various Circuit Courts of Appeal. *Id.*

Petitioner, however, does dispute with the Fifth Circuit's holding in this case that the presumption of disability established by a claimant's proving of his inability to perform his previous job includes a presumption that the extent and duration of that disability is total and permanent.

Petitioner believes the claimant should bear the burden of proving the extent of his disability to be permanent and total as opposed to being permanent and partial, temporary and total, or temporary and partial. Roger's submits that the entire scheme of the LHWCA does not allow a tribunal to "assume" an employee suffers the highest degree of disability under the LHWCA, thereby entitling the claimant to the most generous benefits under the Act, when, in fact, the employee is not at all incapable of performing some types of work. The claimant should be required to prove or at least present evidence tending to show that his physical incapacity prohibits him from engaging in any employment and that he has made diligent attempts to procure some sort of remunerative employment suitable to his impaired condition.

In its opinion affirming the Benefits Review Board, the Fifth Circuit cited its prior ruling in *New Orleans (Gulfwide), supra,* and *Odom Construction, supra,* for the proposition that the burden rests on the employer to establish the availability of job opportunities open to the claimant. However, the holdings of *Gulfwide* and *Odom Construction* should be read in light of the underlying facts present in those cases.

In *Gulfwide,* Edward Turner, a freight handler, injured his right knee. The injury was initially diag-

nosed as a knee strain. Turner returned to work for six months, but his condition worsened. Dr. Matko Milicic, Turner's private orthopedic physician, performed knee surgery which revealed a torn medial meniscus and degenerative arthritis. Turner received post surgery treatment from Dr. Milicic, but continued to experience swelling, pain and weakness in the right knee despite physical therapy. One year after surgery, the doctor indicated that Turner had some atrophy of the muscles, a moderate limp and might at some point in the future require further surgery. Turner was 52 years old at the time of his injury and possessed an eighth or ninth grade education. Dr. Milicic testified that Turner would not be able to engage in work that required prolonged *walking, standing,* heavy lifting or jumping. Dr. Brown, also employed by the claimant, similarly restricted Turner's job opportunities to employment that did not require climbing, *walking* or *standing.* The Administrative Law Judge considered Turner's weakening condition, his age, his good faith attempts to find employment, and the testimony given by the doctors that Turner could not engage in work requiring climbing, *walking, standing,* jumping or heavy lifting. At that point, the ALJ shifted the burden to the employer to demonstrate the availability of work which Turner could perform.

In *Odom Construction, supra,* Garfield Maze was severely injured when an oxyacetylene torch exploded and burned his forearms. Maze was 54 years old at the time of his hearing, had a fourth grade education, and his work history involved jobs which required the heavy use of the arms, wrists, and hands. Dr. Cromwell, who had treated Maze for a year, testified that

Maze's accident had caused him to have a very weak grip and that Maze was unable to do heavy labor and could lift no more than thirty pounds. After his accident, Maze found work as a cement finisher and a truck driver. He stated that he had to quit these jobs due to his physical injuries.

See also Diamond M. Drilling, supra, wherein Oswald Tilsby, a 50 year old worker, sustained a massive heart attack which rendered him incapable of engaging in work involving emotional *stress, standing or walking*. Tilsby searched for employment in the West Columbia, Texas area and enlisted the Texas Rehabilitation Commission to aid him in his search. Tilsby found a position at a supply house requiring little exertion, but resigned after three weeks upon his doctor's advice. He returned to this position a month later but met with the same difficulties and, again, quit.

In *Gulfwide, Diamond M Drilling*, and *Odom Construction*, the nature of the claimant's injury was so severe that it would be reasonable to assume that the claimant would be unable to engage in any type of work. Furthermore, the employee demonstrated an inability to perform his former job and other types of work through expert medical testimony and/or through diligent, although unsuccessful, attempts to procure and engage suitable employment. Under these circumstances, it was reasonable and logical to shift the burden to the employer to demonstrate the availability of work that the injured employee could perform.

In the present case, however, Emile Smith did not meet his initial burden of proof, *i.e.*, he did not demonstrate an inability to perform work other than his

former occupation as a longshoreman. The medical evidence introduced at trial shows that Smith was, in fact, capable of returning to the work force, with certain restrictions. Emile Smith chose not to explore his employment opportunities. For these reasons, the ALJ, the Benefits Review Board and the Fifth Circuit Court of Appeals erred in presuming that Emile Smith was permanently and totally disabled.

The rule established by the Fifth Circuit in the present case runs counter to the goal behind the Longshoreman and Harbor Workers' Compensation Act not only of compensating an injured employee for financial losses but of returning an injured worker to the labor force in order that he may become, once again, a productive member of society. A presumption that an injured worker merely unable to return to his former job is thereby permanently and totally disabled encourages an injured employee, rather than seeking rehabilitation, to rely on the presumption that operates in his favor and to avoid any active effort to secure alternate employement. *See Gulfwide, supra* at 1042.

Even should this Court affirm the lower court's ruling that a claimant establishes a prima facie case of permanent and total disability by merely showing that he cannot return to his former job, this Court should adopt the rule that the burden imposed on an employer to demonstrate the availability of employment opportunities for a claimant is correlative and proportionately related to the severity of the claimant's disability and the attempts of the employee to locate other employment. See *Air America, Inc. v. Director, OWCP*, 597 F.2d 773 (1st Cir. 1979).

Under the *Air America* rule, an employer's burden is light where the claimant's disability is slight and the claimant has made little effort to obtain alternate employment. The employer should not be obligated to make a showing of the availability of job opportunities that is higher in magnitude than the employee's medical disability and his attempts to locate suitable employment.

Nowhere in the Act can one find a presumption of total and permanent disability which arises upon mere proof of inability to return to one and only one kind of employment. The definition of "disability" in 33 U.S.C.A. § 902 (10) comprehends inabilities of various grades and degrees. There are important questions here involving both construction of the LHWCA and the overall policy and purpose of that Act. What law allows the existence of a presumption of the type endorsed by the Fifth Circuit? None.

What goals and policies established by the Congress in the passage of this Act and its amendments are furthered by this sweeping presumption? There are none known to Roger's. Indeed, a legal presumption of total and permanent disability which arises upon mere proof of inability to return to one and only one kind or type of employment frustrates the goal of LHWCA to provide medical care and rehabilitation leading to preservation or resurrection of an injured worker as a productive citizen. *See Gulfwide, supra* at 1042.

b. Liability for Medical Expenses

Sections 7(b) and (c) of the Longshore and Harbor Workers' Compensation Act, along with Rules 702.403 and 702.406, provide the physicians which the em-

ployee may choose. Under these provisions, a claimant may seek medical attention only from those physicians included on the Secretary's list of authorized physicians. Sections 907(b) and (c) and Rules 702.403 and 702.406 deal only with the employee's right to choose certain physicians. Compliance with these provisions alone does not give rise to the employer's obligation to reimburse the employee for expenses. The mere fact that an employee has the right to seek medical care from a particular doctor does not mean that the employer is obligated to pay the doctor's bill. The procedure which an employee must follow in order to obtain reimbursement for medical expenses is provided in Section 7(d) of the Act and Rule 702.421.

Section 907(d) and Rule 702.421 require that the employer refuse or neglect a request for medical care by the employee, *and* that the employee comply with Sections 7(b) and (c) of the Act and the governing regulations before an employee is entitled to reimbursement of his medical expenses. Emile Smith did not comply with Sections 7(b) and (c) of the Act and the applicable regulations.

Emile Smith was injured on May 21, 1978, and he was immediately sent by Roger's Terminal to St. Charles General Hospital. Without first requesting medical treatment from Roger's Terminal, Smith sought medical care from Dr. Kroll. On May 9, 1978, Smith met with the claims adjuster for Roger's Terminal, at which time the adjuster made an appointment for Emile Smith to be examined by Dr. John Garoutte, an orthopedic surgeon, on June 16, 1978. Emile Smith missed this appointment and a second appointment with Dr. Garoutte was scheduled for June 27, 1978. In the meantime, claimant continued to see

his own doctor, Dr. Kroll, on June 10, June 28, and July 12, 1978.

Without obtaining the consent of Roger's Terminal or the Deputy Commissioner, Smith sought treatment from yet another doctor, Dr. Donald Richardson, a neurosurgeon. Dr. Richardson examined Smith on July 21, 1978 and completed his medical report on August 1, 1978, recommending therein that Smith undergo a lumbar myelogram. The myelogram was performed on July 31. The claims adjuster received a copy of Dr. Richardson's medical report on August 2. A lumbar laminectomy was performed on August 3, 1978. The claims adjuster did not learn of this surgery until August 22, 1978.

It is clear from these facts that Emile Smith did not obtain the prior consent of Roger's Terminal before seeing Dr. Kroll. Emile Smith did not obtain the consent of Roger's Terminal or the Deputy Commissioner before visiting Dr. Richardson's office. In fact, Dr. Richardson performed a lumbar myelogram before reporting to Roger's Terminal on his initial examination of Emile Smith, and Dr. Richardson performed a laminectomy of which Roger's Terminal was not aware until some nineteen days later.

Sections 7(b) and (c) provide that the physician chosen by the employee must be included on the Secretary's list of approved physicians. See also 20 C.F.R. 702.403. At the hearing before the ALJ, counsel for Emile Smith offered no evidence tending to show that Dr. Kroll and Dr. Richardson were among those physicians authorized by the Secretary. The ALJ, the Benefits Review Board, and the Fifth Circuit determined that the employer bore the burden of producing evidence to the effect that Dr. Kroll and Dr. Rich-

ardson were not on the Secretary's list of approved doctors. This ruling is in error.

Prior to the 1984 amendments to the LHWCA, which are inapplicable in the present case, Section 907(c) placed the burden on the employee to show the physician chosen by him was included on the Secretary's list of approved physicians. In 1984, Congress amended Section 7(c) and changed the burden of proof under that section. 33 U.S.C.A. § 907(c), as amended by Pub.L. 98-426, currently provides that the Secretary shall annually prepare a list of physicians who are not authorized to render medical care; and under the amended section, a physician chosen by the employer is presumed to be authorized by the Secretary unless his name appears on the Secretary's list of unauthorized physicians.

Since the unamended version of Section 7(c) was in effect at the time of Emile Smith's injury, Smith had the burden of establishing that his doctors were approved by the Secretary. This he did not do; and for this reason, his request for reimbursement of medical expenses should have been denied.

Emile Smith should not be entitled to the reimbursement of the fees, including surgical costs, of Dr. Richardson for an additional reason. Section 7(b) and Regulation 702.406 require an employee to obtain the prior written consent of the employer or the Deputy Commissioner before changing physicians. Emile Smith did not obtain the prior consent of the Deputy Commissioner or Roger's Terminal before changing from Dr. Kroll to Dr. Richardson. The Fifth Circuit excused this failure, citing the language of 20 C.F.R. Section 702.406 that "[s]uch consent shall be given in cases where an employee's initial choice was not

of a specialist" and awarded Smith the medical fees of Dr. Richardson. *Roger's Terminal and Shipping Corporation v. Director, O.W.C.P.*, 784 F.2d 687 at page 4189, n. 6. The Deputy Commissioner may have been required to approve the change of physicians had he received such a request. The fact of the matter is, however, no request was made to the employer or the Deputy Commissioner as required by 33 U.S.C.A. § 907(b) and 20 C.F.R. 702.406. 33 U.S.C.A. § 907(d) and 20 C.F.R. 702.421 explicitly require that an employee comply with Sections 7(b) and (c) of the Act, as well as the Regulations, including 20 C.F.R. 702.406, before being entitled to recover for the medical services of a subsequent doctor. Emile Smith did not comply with these provisions; and for that reason, Roger's Terminal should not be responsible for the payment of the treatment, including the back surgery, rendered by Dr. Richardson.

CONCLUSION

For the reasons set forth above, Petitioner prays that a writ of certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,
JUNEAU, HILL, JUDICE
MARQUET, HILL & ADLEY
A Professional Law Corporation

JOHN K. HILL, JR.
P.O. Drawer 53006
Lafayette, Louisiana 70505
(318) 235-2405
Counsel For Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROGER'S TERMINAL AND SHIPPING CORPORATION,
Petitioner,

v.

DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, DEPARTMENT OF LABOR AND EMILE SMITH,
Respondents.

No. 85-4502
Summary Calendar

OPINION

Filed March 12, 1986

Before: Alvin B. Rubin, Sam D. Johnson, and Edith H. Jones, Circuit Judges

Opinion by Judge Sam D. Johnson

REPORTED AT:

784 F.2d 786 (5th Cir. 1986)

In Longshore and Harbor Workers' Compensation Act proceeding, the Benefits Review Board found longshore-

man permanently and totally disabled due to back injury in course of employment, and employer petitioned for review. The Court of Appeals, Johnson, Circuit Judge, held that: (1) employer failed to meet its initial burden of showing that other jobs which injured longshoreman could perform were available, and (2) there were no procedural deficiencies which relieved employer of its obligation to pay longshoreman's medical expenses.

Affirmed.

John K. Hill, Jr., Lafayette, La., for Roger's Terminal.

Lloyd N. Frischertz, New Orleans, La., T. Timothy Ryan, Jr., Sol. of Labor, U.S. Dept. of Labor, Washington, D.C., Karen Kimball, Glenn H. Woodley, Asst. Deputy Comm., New Orleans, La., for Emile Smith.

Benefits Review Bd., U.S. Dept. of Labor, Washington, D.C., for other interested parties.

Petition for Review of an Order of the Benefits Review Board.

Before RUBIN, JOHNSON and JONES, Circuit Judges.

JOHNSON, Circuit Judge:

Pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (LHWCA), an administrative law judge (ALJ) found that Emile Smith became permanently and totally disabled because of a back injury he sustained while in the course and scope of his employment with Roger's Terminal and Shipping Corporation. The Benefits Review Board affirmed the award, and Roger's Terminal petitions this Court for review asserting that the administrative law judge failed to properly apply the burden proof in this case. In addition, Roger's Terminal argues that it is not responsible for certain med-

ical expenses incurred by Smith for treatment of his injury. The decision of the Board is affirmed.[1]

I. FACTS

On May 21, 1978, Emile Smith slipped and fell while loading grain into the hold of a ship during the course and scope of his employment with Roger's Terminal and Shipping Corporation ("Roger's Terminal"), injuring his back. Smith received emergency care, pursuant to Roger's Terminal's authorization, at St. Charles General Hospital in New Orleans where he was treated and released to return to work.

Smith, who testified that he still was experiencing pain, consulted his attorney and was referred to Dr. Kroll. Dr. Kroll diagnosed Smith's condition as a lumbosacral strain. After three more visits, Dr. Kroll referred Smith to a neruosurgeon, Dr. Richardson. During Dr. Kroll's initial treatment of Smith, the claims adjuster for Roger's Terminal made an appointment for Smith with Dr. Garoutte. Smith missed the first appointment, but it was rescheduled and he attended the rescheduled appointment. Dr. Garoutte determined that Smith was suffering from chronic lumbar strain, and noted his agreement with Dr. Kroll that conservative treatment was warranted at that time.

On July 21, 1978, Smith was examined by Dr. Richardson. Dr. Richardson concluded that Smith had a left L-5 nerve root sciatica, and he recommended that Smith undergo a lumbar myelogram. Smith was admitted to Southern Baptist Hospital on July 30, 1978, and a lumbar myelogram was performed the following day. The myelogram revealed "a blunting of the nerve root at L-5 level on the left with a suggestion of a small extradural defect

[1] Smith moved to dismiss this appeal on the ground that Roger's Terminal failed to name Smith as respondent and Smith was an indispensable party to the appeal. Smith's motion is without merit and is denied.

comparable with a small ruptured disc." Record Vol. 1 at 51; Exhibit S-7. Dr. Richardson scheduled a lumbar laminectomy which was performed on August 3, 1978. Smith was discharged on August 10, 1978.

Dr. Richardson determined that Smith reached maximum medical improvement and discharged him on November 24, 1978. Dr. Richardson's final conclusion was that Smith had an estimated disability f fifteen to twenty percent of the body as a whole and that Smith should not do work requiring heavy lifting of more than seventy-five to one hundred pounds or repeated bending. Dr. Garoutte reevaluated Smith on February 12, 1979, at the request of Roger's Terminal. Dr. Garoutte determined that Smith had reached maximum medical improvement and that Smith had a twenty percent permanent partial disability of the lumbar spine. Dr. Garoutte expressed the opinion that Smith was not capable of returning to his prior employment, but that Smith could do other types f work.

During the hearing before the administrative law judge, the parties agreed that Smith would be evaluated by another neurologist, Dr. Schumacher. Dr. Schumacher concluded that Smith had a five to ten percent permanent whole man physical impairment. Dr. Schumacher also concluded that Smith should avoid repetitive lifting, bending, pulling, or pushing of more than seventy-five pounds.

After his injury, Smith moved from New Orleans to Natchez, Mississippi, where he lives with his grandmother. Smith was raised in Natchez. He has a seventh grade education and cannot read or write. Smith's employment history includes work as a laborer and a longshoreman. He has not worked since his accident.

The administrative law judge determined that Smith was unable to return to his occupation as a longshoreman as a result of his injury. The administrative law judge then shifted the burden to Roger's Terminal to demonstrate the "realistic job opportunities which the Claimant can per-

form. . . ." Record Vol. 1 at 52. The ALJ further concluded that because Roger's Terminal "introduced no evidence to show the general availability of suitable employment," Record Vol. 1 at 53, Smith was temporarily and totally disabled From May 21, 1978, until November 24, 1978, and thereafter that Smith was permanently and totally disabled "until such time as the Claimant is able to find alternative employment or the Employers comes forward with evidence establishing that there are suitable, realistic jobs available to the Claimant." Record Vol 1 at 53. Finally, the ALJ determined that Roger's Terminal was liable for all medical expenses that were incurred as a result of Smith's injury. The Benefits Review Board affirmed the decision of the ALJ. Roger's Terminal now petitions this Court for review. We affirm.

II. DISCUSSION

A. *The Finding of Permanent Total Disability*

The LHWCA defines disability as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment, . . ." 33 U.S.C. § 902(10). The act itself fails to provide a standard to determine the extent of a disability and to distinguish between those injuries resulting in total permanent, permanent partial, temporary total, and temporary partial disabilities. *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 1037 (5th Cir. 1981). It is settled law that "[t]he degree of disability is determined not only on the basis of physical condition but also on factors such as age, education, employment history, rehabilitative potential, and the availability of work that the claimant can do." *Id.* at 1037-38. *Odom Construction Co. v. United States Department of Labor,* 622 F.2d 110, 115 (5th Cir.1980), *cert. denied,* 450 U.S. 966, 101 S.Ct. 1482, 67 L.Ed.2d 614 (1981); *Diamond M. Drilling Co. v. Marshall,* 577 F.2d 1003, 1005-06 (5th Cir.1978).

In *New Orleans (Gulfwide),* this Court stated the burdens that obtain in a compensation case:

By combining the concept of disability as not merely physical with the statutory and case law presumption of coverage, the rule generally stated is that a claimant establishes a prima facie case of disability by showing he cannot perform his former job because of job-related injury. At that point, the burden then shifts to the employer to establish the availability of other jobs that the claimant could perform.

661 F.2d at 1038; *Odom,* 622 F.2d at 115.

The ALJ determined that Smith was unable to return to his former job because of his job-related injury. The Benefits Review Board specifically affirmed that finding. On review, this Court is limited to considering errors of law as well as to making certain that the Board adhered to its statutory standard of review of factual determinations, which is whether the findings of fact are supported by substantial evidence and consistent with the law. *Marathon Oil Co. v. Lunsford,* 733 F.2d 1139, 1141 (5th Cir.1984); *New Orleans (Gulfwide),* 661 F.2d at 1037. There is more than substantial evidence supporting this factual determination, and Roger's Terminal does not specifically challenge this finding.

The ALJ then shifted the burden to Roger's Terminal to establish the availability of other jobs that Smith could perform. The ALJ determined that Roger's Terminal failed to meet its burden. Roger's Terminal now asserts that the ALJ erroneously misapplied the relevant burdens involved in a showing of job availability.

In *New Orleans (Gulfwide),* this Court elaborated on the employer's burden to demonstrate job availability:

Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following

his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to complete and which he could realistically and likely secure? The second question in effect requires a determination of whether there exists a reasonable likelihood, given the claimant's age, education, and vocational background that he would be hired if he diligently sought the job.

661 F.2d at 1042-43 (footnote omitted).

Roger's Terminal correctly notes, however, that this Court assigned a correlative burden on the employee to demonstrate inability to obtain potentially available employment. 661 F.2d at 1042.

This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternate employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available. *This obligation to seek work does not alter the statutory presumption of coverage, nor the employer's initial burden of job availability* It merely makes explicit that which has always been implicit—*if alternate jobs exist* which the claimant could reasonably perform and secure had he diligently tried, the employer, *after demonstrating the existence of such jobs* has met his burden.

661 F.2d at 1043 (emphasis added; emphasis in original deleted).

Roger's Terminal asserts, relying on this language in *New Orleans (Gulfwide),* that a claimant has not presented a prima facie case until the claimant has (1) demonstrated his inability to perform his past job, and (2) also demonstrated that he cannot perform any work or that he has

engaged in a diligent search and failed to obtain any employment.

This Court does not fully agree with this interpretation of the *New Orleans (Gulfwide)* opinion. That opinion makes clear that the burden placed on the employee does not displace the employer's *initial* burden of demonstrating job availability. This initial burden requires the employer to demonstrate the types of jobs that the claimant can perform, that those types of jobs are available in the relevant community, and that there is a reasonable likelihood that the claimant would be hired if he diligently sought the job. If the employer makes such a showing, the employer's burden has been met, and the claimant can then prevail if he demonstrates that he diligently tried and was unable to secure such employment.

In the instant case, the ALJ found the record completely devoid of *any* evidence supporting the existence of the type of work the claimant could perform in the relevant community. The Benefits Review Board affirmed that factual determination, and this Court's own review of the record confirms that the only relevant allegation in the record consists of a completely unsupported statement by Roger's Terminals attorney that such jobs existed in the community. The ALJ correctly determined that such an unsubstantiated allegation was insufficient to carry the employer's burden.[2] This Court has previously held that failure to present any evidence of job availability can support a determination of permanent total disability if the claim-

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[2] Roger's Terminal asserts that this Court should place an extremely light burden on the employer in a situation where the claimant's disability is slight and a correspondingly heavier burden in those situations where the claimant's disability is severe, citing *Air America, Inc. v. Director, Office Workers' Compensation Programs*, 597 F.2d 773 (1st Cir.1979). This Court need not address whether such a "sliding scale" approach to the employer's burden is appropriate in this case because Roger's Terminal wholly failed to introduce any evidence on job availability.

ant is incapable of returning to his former job. *Odom*, 622 F.2d at 116.

B. *Liability for Medical Expenses*

Roger's Terminal asserts that it is not liable for Smith's medical expenses because Smith did not comply with the procedures for recovery of medical expenses set forth in 33 U.S.C. § 907.[3] Roger's Terminal asserts that Smith is not entitled to recover his medical expenses because (1) Smith failed to request Roger's Terminal to furnish the treatment or services provided to him and Roger's Terminal at no time refused or neglected to provide or authorize necessary medical care; (2) pursuant to section 907, Smith could not change from Dr. Kroll to Dr. Richardson without the prior written consent of the employer or the Deputy Commissioner, and no such consent was given in this case; (3) nothing in the record demonstrates that Dr. Kroll and Dr. Richardson were on the list of physicians

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[3] Prior to the 1984 amendments, which are inapplicable here, 33 U.S.C. § 907(d) provided in pertinent part:

> An employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless he shall have requested the employer to furnish such treatment or services, or to authorize provision of medical or surgical services by the physician selected by the employee, and the employer shall have refused or neglected to do so, or unless the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize the same; nor shall any claim for medical or surgical treatment be valid and enforceable, as against such employer, unless within ten days following the first treatment the physician giving such treatment furnish to the employer and the Secretary a report of such injury and treatment, on a form prescribed by the Secretary. The Secretary may, however, excuse the failure to furnish such report within ten days when he finds it to be in the interest of justice to do so, and he may, upon application by a party in interest, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee. . . .

authorized by the secretary pursuant to section 907(b) and (c);[4] and (4) although Smith had a right to choose his own physician pursuant to section 907(b), Smith is not entitled to recover for the services of Dr. Kroll because Dr. Kroll did not provide Roger's Terminal with a report of the injury and treatment within ten days of the first treatment as required by section 907(d). This Court rejects each of these arguments.

The ALJ determined that Smith's medical expenses were recoverable. Several of the ALJ's findings are important to a resolution of these issues. The ALJ found that Smith had been released from St. Charles General Hospital as "fit for duty." Record Vol. 1 at 53. The ALJ found that Smith chose Dr. Kroll and Dr. Richardson as the physicians of his choice pursuant to section 907(b) and 22 C.F.R. § 702.403. The ALJ specifically found that "demand was made upon the Employer for authorization for payment of medical services rendered to Mr. Smith which the Employer refused to do." *Id.* The ALJ also refused to credit the assertion by Roger's Terminal that at all times it was willing to furnish medical care to Smith through Dr. Garoutte. The ALJ concluded that Dr. Garoutte's examinations of Smith were for evaluation purposes only. The ALJ determined that Roger's Terminal was fully aware of Smith's initial treatment and hospitalization, even though the employer was not aware of the actual surgery until

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[4] 33 U.S.C. § 907(b) provided in pertinent part:

> The employee shall have the right to choose an attending physician authorized by the Secretary to provide medical care under this Act as hereinafter provided. . . .

33 U.S.C. § 907(c) stated:

> The Secretary may designate the physicians who are authorized to render medical care under the Act. The names of physicians so designated in the community shall be made available to employees through posting or in such other form as the Secretary may prescribe.

after the fact. The ALJ concluded, however, that Roger's Terminal should have been aware that Smith's treatment might include surgery. Finally, the ALJ found that all medical treatment sought by Smith and the corresponding expenses were necessitated by Smith's injury.

In *Atlantic & Gulf Stevedores, Inc. v. Neuman*, 440 F.2d 908 (5th Cir.1971), this court affirmed the holding of an ALJ that a claimant's failure to abide by the strictures of section 907 did not necessarily bar recovery of medical expenses. In that case, the employer contended that the claimant failed to obtain prior approval for treatment and that the employer at not time refused medical treatment. This Court approved the reasoning of the ALJ, who held that once an employee has been refused treatment by the employer, through a refusal by the employer's doctor to provide further treatment, the claimant needs only to establish that treatment he subsequently procured on his own initiative was necessary treatment for the injury in order to be entitled to recover the expense from the employer. 440 F.2d at 911.[5]

The ALJ found that Roger's Terminal refused to authorize treatment, and Roger's Terminal challenges that

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[5] *Slattery Associates, Inc. v. Lloyd*, 725 F.2d 780 (D.C.Cir.1984) (when an employee is told by the employer's physician that he is recovered and his injury requires no further treatment, he has been refused treatment by the employer and is entitled to reimbursement for all necessary treatment subsequently procured on his own initiative). *See also Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968 (D.C.Cir. 1982), *cert. denied*, 459 U.S. 1146, 103 S.Ct. 786, 74 L.Ed.2d 993 (1983).

This case, unlike *Neuman*, *Shahady*, and *Lloyd*, does not involve construing a refusal by the employer's doctor to continue treatment as a refusal by the employer of further treatment. Rather, the instant case involves a finding that the *employer* itself refused to provide or authorize medical treatment for the claimant. Nevertheless, we not that St. Charles General Hospital, where Smith as fit to return to work. The ALJ did not rely on that fact, however, to support the conclusion that Roger's Terminal refused to provide or authorize treatment.

finding. Though Roger's Terminal takes the position that it was willing to provide care through Dr. Garoutte, it does not specifically challenge the ALJ's finding that Dr. Garoutte's examinations were for evaluation purposes only. The record supports that conclusion of the ALJ. Moreover, the record clearly supports the conclusion that Roger's Terminal was asked to authorize treatment by Dr. Richardson and Roger's Terminal refused. Consequently, the ALJ did not err in determining, in accordance with this Court's decision in *Neuman*, that all medical expenses subsequent to Roger's Terminal's refusal to authorize or provide needed care, including the surgical costs and Dr. Richardson's fees, were recoverable.[6]

Roger's Terminal asserts that Dr. Kroll and Dr. Richardson were not authorized to provide treatment by the Secretary, as required by section 907(b) and (c). Both the ALJ and the Benefits Review Board determined that the employer bore the burden of producing evidence to that effect. No such evidence was in fact presented. This Court finds no error in that assignment of the burden. Such an interpretation is consistent with the general rule that the LHWCA is to be construed liberally in favor of the injured employee. *New Orleans (Gulfwide)*, 661 F.2d at 1038.[7]

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[6] Consequently, the argument that Roger's Terminal is not liable for Dr. Richardson's expenses because no prior written authorization was obtained for a change of physicians is meritless. Roger's Terminal had refused specialized care prior to Smith's first visit to Dr. Richardson. Moreover, 33 U.S.C. § 907(b) allows an employer to change physicians in accordance with the regulations, and 20 C.F.R. § 702.406 sets forth the procedure. That regulation provides that an employee who chooses his own physician may not thereafter change without the prior written consent of the employer. The regulation further provides, however, that "[s]uch consent *shall* be given in cases where an employee's initial choice was not of a specialist" whose services are necessary for proper treatment. That provision is directly applicable in this case.

[7] It is noted that § 907(c) was amended in 1984 to provide posting of only those physicians and health care providers *not* authorized to provide medical care.

Finally, this Court notes that section 907(d) provides that if the claimant chooses his own physician, the physician must provide the employer and the Secretary with a report of the injury and treatment within ten days following the first treatment. Dr. Kroll first treated Smith on May 25, 1978. He prepared a report on May 31, 1978, and Smith hand delivered that report to the employer on June 9, 1978. Thus the report was not delivered until fifteen days after the first treatment.

We note, however, that Roger's Terminal had actual notice of the injury on the day of its occurrence, May 21, 1978. Moreover, the employer's representative indicated that he first learned of Smith's treatment by Dr. Kroll over the telephone prior to Smith's visit to the representative on June 9, 1978. Consequently, the employer suffered no actual prejudice from the report being delivered five days later than the statute requires.

The LHWCA provides that the Secretary may excuse late reporting "when he finds it in the interest of justice to do so." 33 U.S.C. § 907(d). The ALJ likewise may excuse late reporting for good cause shown. The better procedure, in a case where the ALJ has not made a specific finding that late reporting is excused, would be to remand the case for such a determination. *See Slattery Associates, Inc. v. Lloyd,* 725 F.2d at 787. Nevertheless, this Court concludes that such a remand would be a mere formality in this case. The ALJ and the Benefits Review Board both have determined that Smith substantially complied with the regulations. We have concluded that the employer suffered no prejudice from the minimal delay involved in the case because the employer was aware of the injury at the outset and received actual knowledge of the treatment before the report was received. This Court is confident that the tardy filing of the report in this case would be excused, and we would be inclined to view a refusal to

do so as an abuse of discretion under these facts. *See Shahady*, 682 F.2d at 970.[8]

III. CONCLUSION

For the reasons stated, the decision of the Benefits Review Board is

AFFIRMED.

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[8] *Cf. Nardella v. Campbell Machine Inc.*, 525 F.2d 46, 50 (9th Cir.1975) (a note from doctor, "shortly" after treating claimant, to employer's personnel office informing employer that claimant would be disabled for a month constituted "substantial compliance" with section 907(d), although failure of other doctors to comply not excused by ALJ or court). *But see Maryland Shipbuilding and Drydock Co. v. Jenkins*, 594 F.2d 404 (4th Cir.1979) (noncompliance with section 907(d) barred recovery of medical expenses in situation where claimant never requested treatment or authorization from employer, claimant refused to be examined by employer's physician, and claimant's physician never sent 907(d) report to employer).

APPENDIX B

BENEFITS REVIEW BOARD

EMILE SMITH

Claimant-Respondent

v.

ROGER'S TERMINAL AND SHIPPING CORPORATION

Self-Insured Employer-Petitioner

OPINION

Not Published

81-2026

DECISION and ORDER

Appeal of the Decision and Order and Order Denying Petition for Rehearing of Michaelle F. Pitard, Administrative Law Judge, United States Department of Labor.

LLoyd N. Frischhertz (Seelig, Cosse, & Frischhertz), New Orleans, Louisiana, for the claimant.

Donald O. Collins (Jones, Walker, Waechter, Poitevent, Carrere & Denegre), New Orleans, Louisiana, for the employer.

Before: RAMSEY, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and Order Denying Petition for Rehearing (80-LHCA-51N) of Administrative Law Judge Michaelle F. Pitard pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter, the Act).[1]

Claimant injured his back while loading grain onto a ship on May 21, 1978. The administrative law judge found that claimant was temporarily totally disabled from May 21, 1978, to November 24, 1978, the date of maximum medical improvement, and permanently totally disabled thereafter. The administrative law judge further found that employer was liable for the payment of medical expenses incurred as a result of the May 1978 injury.

On appeal, employer argues that the administrative law judge erroneously found that claimant was permanently totally disabled and that employer failed to meet its burden of proving the general availability of job opportunities. Employer also argues that the administrative law judge erred in finding that claimant was entitled to medical benefits under Section 7 of the Act, 33 U.S.C. §907. Employer requests reversal of the administrative law judge's decision or remand of the case. Claimant responds that the administrative law judge's decision should be affirmed.

The Board's scope of review is limited. The administrative law judge's findings must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with law. *O'Keffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

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[1] Due to the death of Administrative Law Judge Edwards, who conducted the hearing in the case, the case was reassigned to Administrative Law Judge Pitard. Judge Pitard properly decided the case on the record developed before the original administrative law judge as no credibility determinations were involved and the parties waived their right to a *de novo* hearing. *See Creasy v. J. W. Bateson Co.*, 14 BRBS 434 (1981).

Employer argues that the administrative law judge erroneously found that claimant was permanently totally disabled.[2] We reject employer's argument that claimant did not meet his burden of establishing that he is unable to return to his usual employment as a longshoreman. The record includes claimant's testimony that he has always worked as a laborer and he is not unable to perform work requiring heavy lifting due to pain. In addition, the medical opinions of Dr. Richardson, Dr. Garoutte and Dr. Schumacher establish that claimant cannot perform the heavy work of a laborer on the docks although he may be capable of some forms of employment. The administrative law judge's finding that claimant was not able to perform his usual duties as a longshoreman is therefore affirmed.

Once claimant establishes that he is unable to perform his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981), *rev'g*, 5 BRBS 418 (1977). *See Trans-State Dredging v. Benefits Review Board (Turner)*, 731 F.2d 199 (4th Cir. 1984). In order to meet its burden of establishing suitable alternate employment, employer must show that, considering claimant's age, education, and work experience, there are jobs reasonably available in the geographical area where claimant resides, for which he can compete and which he could realistically secure if he actively retires. *Turner*, 661 F.2d at 1042, 14 BRBS at 165. In the instant case, the administrative law judge specifically stated that employer presented no evidence establishing the availability of suitable employment in New Orleans, Louisiana (claimant's

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[2] Contrary to employer's argument, the administrative law judge's decision clearly indicates that she relied on the date of maximum medical improvement in determining that claimant's injury was permanent. Decision and Order, slip op. at 3, 5. Furthermore, the administrative law judge's finding that claimant reached maximum medical improvement on November 24, 1978, is supported by substantial evidence.

residence at the time of the injury), or Natchez, Mississippi (claimant's residence at the time of the hearing). The administrative law judge stated that employer's attorney's assertion that there are advertisements for general labor work did not constitute evidence of employment opportunities. We affirm the administrative law judge's finding that employer did not meet its burden of proving the availability of suitable alternate employment.

Finally, we reject employer's argument that claimant is not entitled to payment of medical expenses under Section 7.[3] Section 7(d) provides, in part, that an employee is not entitled to recover medical expenses unless he has requested that his employer furnish or authorize necessary treatment or services and the employer has refused or neglected to do so. In the instant case, the administrative law judge's findings that authorization was requested for claimant's treatment and was refused by employer are supported by substantial evidence and contain no reversible error.[4]

Accordingly, the administrative law judge's Decision and Order awarding compensation payments and medical benefits is affirmed.

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[3] Section 7 has been recently amended. Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, 1642-44. The Amendments do not affect the disposition of this case.

[4] We note that employer's selection of Dr. Garoutte to treat claimant is not controlling since claimant had the right to choose Dr. Kroll as his attending physician. 33 U.S.C. §907(b). Furthermore, Dr. Kroll's referral of claimant to Dr. Richardson, a neurosurgeon, is not contrary to 20 C.F.R. §702.406, which provides for a change to an appropriate specialist.

We also note that employer presented no evidence in support of its assertion that neither Dr. Kroll nor Dr. Richardson were authorized to furnish medical treatment by the Director pursuant to 20 C.F.R. §702.403.

SO ORDERED.

/s/ ROBERT L. RAMSEY,
Robert L. Ramsey, Chief
Administrative Appeals Judge

/s/ ROY P. SMITH
Roy P. Smith
Administrative Appeals Judge

/s/ NANCY S. DOLDER
Nancy S. Dolder
Administrative Appeals Judge

Dated this 29th
day of May 1985

APPENDIX C

ORDER DENYING PETITION FOR REHEARING

of

MICHAELLE F. PITARD
Administrative Law Judge
EMILE SMITH

Claimant

against

ROGER'S TERMINAL AND SHIPPING CORPORATION
Self-Insured Employer

Case No. 80-LHCA-51N
OWCP No. 7-52615

ORDER DENYING PETITION FOR REHEARING

On July 27, 1981 the Respondent filed a Petition for Rehearing stating therein that a rehearing should be held for the reason that the Decision and Order did not conform to the oral and documentary evidence presented at the original hearing. Essentially, the Employer submits that the evidence established that the Claimant was able to work; however, since he lived in a rural area, he was unable to find suitable employment.

As set forth in the Decision and Order, this matter was heard by Judge Julian B. Edwards. Prior to the preparation of a decision, Judge Edwards passed away. Both parties were given the opportunity to request a new hearing. Both parties waived their rights to a new hearing and agreed to submit the matter on the record developed before Judge Edwads.

The evidence in the record unequivocally established that the Claimant, Emile Smith, is unable to return to his prior employment as a longshoreman due to his May 21, 1978 work related injury. Once the Claimant shows that he cannot return to his prior employment, the burden shifts to the Employer to offer evidence as to the general availability of realistic job opportunities which the Claimant can perform. *Sime Crbic v. Northeast Stevedoring Company, et al.*, 13 BRBS 282, BRB No. 78-603 (August 1980). *Newport News Shipbuilding and Dry Dock Co. v. Campbell*, 592 F.2d 762 (4th Cir. 1979). The record does establish that Mr. Smith is physically capable of performing some type of work; however, disability, as used in the Act, is more than a mere medical concept. Consideration must be given to other factors including the availability of suitable employment. *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5h Cir. 1978).

The Employer introduced no evidence to show the general availability of suitable employment in New Orleans, Louisiana (the area where Mr. Smith was residing at the time of his injury), Natchez, Mississippi (the area where Mr. Smith currently resides) or any area. A naked assertion of the existence of newspaper advertisements for general labor work made by counsel for the Employer does not constitute evidence. If the Respondent is of the opinion that the Decision and Order does not conform to the evidence presented in the record the proper procedural vehicle is an appeal to the Board. The Employer may also consider applying for a modification of the award pursuant to Section 22 of the Act if suitable employment opportunities presently exists. The Petition for a Rehearing is, however, denied for the reasons that: 1) the Employer had the opportunity to obtain a new hearing and declined same; (2) if the Employer is aggrieved because the Decision and Order does not conform to the evidence presented in the original hearing the proper procedural vehicle is an appeal rather than a rehearing (3) to grant a rehearing for the

sole purpose of allowing the Employer to introduce evidence which was available or should have been available at the time of the first hearing would effectually destroy the concept of a hearing process.

/s/MICHAELLE F. PITARD
Michaelle F. Pitard
Administrative Law Judge

Dated: August 26, 1981
New Orleans, Louisiana

N/6

APPENDIX D

DECISION AND ORDER—AWARDING BENEFITS

of

MICHAELLE F. PITARD
Administrative Law Judge
EMILE SMITH

Claimant

against

ROGER'S TERMINAL AND SHIPPING CORPORATION
Self-Insured Employer

Case No. 80-LHCA-51N

OWCP No. 7-52615

Joe M. Inabnett, Esquire
1633 St. Charles Avenue
New Orleans, Louisiana 70130
For the Claimant

Donald O. Collins, Esquire
225 Baronne Street, Suite 2800
New Orleans, Louisiana 70112
For the Employer

Before: MICHAELLE F. PITARD
Administrative Law Judge

DECISION AND ORDER—AWARDING BENEFITS

This is a claim for workmen's compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 901, *et seq.*), herein referred to as the "Act". Hearings were held on March 26, 1980 and November 3, 1980 in New Orleans, Louisiana, before Ju-

lian B. Edwards, Administrative Law Judge, at which time all parties were given the opportunity to present evidence and oral arguments.

Prior to the preparation of a decision, Judge Edwards passed away. By Order to Show Cause the parties were given the opportunity to request a new hearing. No party has done so. This matter is being decided on the basis of the record developed before Judge Edwards.

Stipulations

The parties have stipulated and I find:

1. On May 21, 1978 Claimant, Emile Smith, suffered an accidental injury to his lower back within the course and scope of his employment and within the jurisdiction of the Act.

2. That Claimant's Employer at the time of his injury was Rogers Terminal and Shipping Corporation (herein Employer).

3. That Claimant's average weekly wage at the time of injury was $310.71.

Issues

The principal unresolved issues in this proceeding are restricted to the nature and extent of Claimant's disability and to Employer's liability for payment of medical services rendered Claimant in connection with his injury of May 21, 1978.

Findings of Fact and Conclusions of Law

1. On May 21, 1978 Emile Smith slipped and fell while loading grain into the hold of a ship in the course of his employment with Rogers Terminal and Shipping Corporation (Tr. 36-37).

2. Mr. Smith proceeded, pursuant to his Employer's authorization, to St. Charles General Hospital where he was treated and released to return to work (Tr. 37-39).

3. On May 25, 1978 Mr. Smith was evaluated by Vernon R. Kroll, M.D. at the referral of his attorney (Tr. 38, Exhibit S-5). After examination Dr. Kroll was of the opinion that Mr. Smith had sustained a lumbosacral back strain (Exhibit S-5).

4. Mr. Smith returned to Dr. Kroll on June 10, June 28, and July 12, 1978. Dr. Kroll arranged for a consultation with Dr. Donald Richardson, neurosurgeon, on the July 12, 1978 visit (Exhibit S-6; Tr. 39-41).

5. On June 9, 1978 the Claimant met with Raymond J. Heller, the Employer's compensation claims adjuster. The Claimant delivered to Mr. Heller a copy of Dr. Kroll's medical report dated May 31, 1978 in which Dr. Kroll noted that Mr. Smith was to return to his office for follow-up care. Mr. Heller made an appointment for Mr. Smith to be examined by Dr. John Garoutte on June 16, 1978. Mr. Smith missed the first appointment with Dr. Garoutte which was subsequently rescheduled (Tr. 91-96).

6. On July 17, 1978 Mr. Smith was evaluated by Dr. John Garoutte, M.D. on behalf of the Employer. Dr. Garoutte was of the opinion that Mr. Smith was suffering from chronic lumbar strain. He anticipated gradual recovery with conservative treatment (Exhibit S-4).

7. By telephonic communication and written correspondence from Claimant's counsel Mr. Heller was advised that Mr. Smith had been referred to a neurosurgeon by Dr. Kroll. A request was made for payment of this consultation and treatment (Tr. 100-102, Exhibit S-2).

8. On July 21, 1978 Mr. Smith was examined by Dr. D.E. Richardson, M.D. Dr. Richardson was of the opinion that the Claimant probably had a left L-5 nerve root scia-

tica. Dr. Richardson recommended that Mr. Smith be hospitalized for a lumbar myelogram (Exhibit S-3, Tr. 43-44).

9. Mr. Heller was advised that the Claimant was to be hospitalized for a myelogram (Tr. 104-105).

10. Mr. Smith was admitted to Southern Baptist Hospital on July 30, 1978. A lumbar myelogram was performed on July 31, 1978. The test revealed a blunting of the nerve root at L-5 level on the left with a suggestion of a small extradural defect comparable with a small ruptured disc. A lumbar laminectomy with the removal of L-5 disc was performed on August 3, 1978. Mr. Smith's postoperative course was benign and he was discharged on August 10, 1978 (Exhibit S-7).

11. On November 24, 1978 Mr. Smith was discharged by Dr. Richardson as reaching maximum medical improvement. Dr. Richardson was of the opinion that Mr. Smith had an estimated disability of 15-20 percent of the body as a whole on a partial permanent basis and should not do work requiring heavy lifting more than 75-100 pounds or repeated bending (Exhibit S-13).

12. On February 12, 1979 Mr. Smith was re-evaluated by Dr. John V. Garoutte, M.D. at the Respondent's request. Dr. Garoutte was of the opinion that Mr. Smith had reached maximum medical improvement and that the Claimant had a 20 percent permanent partial disability of the lumbar spine. Dr. Garoutte believed that Mr. Smith was not capable of returning to his prior employment but could do other types of work (Exhibit S-14).

13. In November of 1978 the Claimant moved from New Orleans, Louisiana to Natchez, Mississippi. Mr. Smith has a seventh grade education and cannot read or write. He has worked as a laborer and longshoreman (Tr. 59-63).

14. As a result of the testimony of Mr. Smith at the hearing the parties agreed to have the Claimant examined by Dr. John F. Schuhmacher, M.D., a neurologist. On June

18, 1980 Mr. Smith was seen by Dr. Schuhmacher, M.D. Dr. Schuhmacher was of the opinion that Mr. Smith should be able to do some type of gainful employment; however, the Claimant should avoid repetitive lifting, bending, pulling, or pushing of weights in excess of seventy-five pounds. Dr. Schuhmaker believed the Claimant had a 5-10 percent permanent whole man physical impairment.

15. Mr. Smith has not been gainfully employed since May 21, 1978.

16. Mr. Smith is unable to return to the occupation of longshoreman as a result of his May 21, 1978 injury.

17. The treatment, hospitalization, and/or medical services rendered to Emile Smith by Vernon Kroll, M.D., New Orleans Anesthesia Associates, New Orleans Surgical and Medical Clinic, D.E. Richardson, M.D., and Southern Baptist Hospital were necessitated as a result of the May 21, 1978 injury.

Conclusions of Law

1. Disability, as defined by the Act, is the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment". 33 U.S.C. 902(10) Disability is an economic concept which cannot be measured by the Claimant's physical or medical condition alone; consideration must be given to other factors such as age, education, employment history, and the availability of suitable employment. *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Circuit, 1978); *Nardella v. Campbell Machine, Inc.* 525 F.2d 46 (9th Cir., 1975)

2. It is well-settled that under the Act the burden shifts to the Employer to offer evidence as to the general availability of realistic job opportunities which the Claimant can perform when the Claimant has shown that he cannot return to his prior employment. *Sime Grbic v. Northeast*

Stevedoring Company, et al. 13 BRBS 282, BRB No. 78-603 (August 1980); *Newport News Shipbuilding and Drydock Co. v. Chappell,* 592 F.2d 762 (4th Circuit, 1979).

3. Based upon the testimony of the Claimant and the medical records of all the physicians who examined the Claimant, it is clear that Mr. Smith cannot return to his prior employment as a longshoreman.

4. The Employer introduced no evidence to show the general availability of suitable employment. The Employer's naked assertion by counsel that there are advertisements for general labor work does not demonstrate any substantial degree of suitable work which is available to Mr. Smith.

5. I, therefore, find that the Claimant, Emile Smith, was temporarily and totally disabled from May 21, 1978 until November 24, 1978, the date he was found by Dr. Richardson to have reached maximum medical improvement. I further find that Emile Smith is permanently and totally disabled from November 24, 1978 and continuing until such time as the Claimant is able to find alternative employment or the Employer comes forward with evidence establishing that there are suitable, realistic jobs available to the Claimant.

6. Section 7(a) of the Act provides that "the employer should furnish such medical, surgical, and other attendance or treatment, nurse and hospital service . . . for such period as the nature of the injury or the process of recovery may require". 33 U.S.C. 907(a)

7. An employee may recover for medical treatment or services only if he requested the employer to furnish such treatment or service, or to authorize provision of medical or surgical services by the employee's physician and the employer refused or neglected to do so. 33 U.S.C. 907(d)

8. An employee has the right to choose his own attending physician. 33 U.S.C. 907(b), 20 C.F.R. 702.403 - 702.404.

9. It is clear from the evidence that the Claimant, after being released from St. Charles General Hospital as fit for duty, chose Dr. Vernon Kroll and Dr. Richardson as the physicians of his choice. It is further clear that demand was made upon the Employer for authorization for payment of medical services rendered to Mr. Smith which the Employer refused to do.

Although the Employer contends that it was willing to furnish medical treatment of the Claimant through the services of Dr. Garoutte, it is apparent from Dr. Garoutte's reports that his examinations of Mr. Smith were for evaluation purposes only.

Mr. Heller was fully aware of Claimant's initial treatment and hospitalization by Dr. Richardson. The mere fact that he was not aware of Claimant's operation, prior to the fact, does not effect the Employer's responsibility for payment of medical services when the Employer was aware that Mr. Smith was being treated by Dr. Richardson and should have been aware that this treatment might include a surgical procedure.

I, accordingly, find that the Claimant is entitled to payment of the medical services and care rendered to him as a result of his May 21, 1978 injury which he was paid and/or was incurred by him.

Since the Claimant has prevailed, his counsel is entitled to a professional fee pursuant to Section 28 of the Act. By letter dated November 4, 1980, Joe Inabnett submitted an attorney fee application. No opposition or comment relative to this fee application has been received from the Respondent. A study of fee petition herein reflects that counsel for Claimant spent thirty-six hours on Claimant's case; which is considered to be reasonable and necessary

and based upon an hourly rate of $60.00 per hour totals $2,160.00. It is determined that the hourly rate is a reasonable one for the services given the prevailing community charges for legal services. In addition, costs of $67.50 were itemized in the application and are hereby approved bringing the total amount of approved fees and costs to $2,227.50.

Based upon the foregoing Findings of Fact, Conclusions of Law and the entire record, I make the following Compensation Order. The specific dollar computations of the compensation award shall be administratively performed by the Deputy Commissioner. It is further recommended that the Deputy Commissioner refer Emile Smith for vocational rehabilitation and/or employment counseling.

ORDER

It is therefore ORDERED that:

1. The Respondent shall pay to Claimant compensation for temporary total disability for the period of time from May 21, 1978 up to and including November 24, 1978 based upon an average weekly wage of $310.71 to be computed in accordance with the provisions of Section 8(b) of the Act.

2. The Respondent shall pay to Claimant compensation for permanent total disability for the period of time from November 25, 1978 continuing thereafter until such time as a new compensation order is obtained based upon an average weekly wage of $310.71 to be computed in accordance with the provisions of Section 8(a) of the Act plus the applicable annual adjustments provided in Section 6(b).

3. Respondent shall receive credit for all amounts of compensation previously paid to the Claimant as a result of his May 21, 1978 injury.

4. At the hearing of this matter the issue relating to Section 14 additional compensation was not discussed by anyone nor was any evidence submitted necessary to reach a determination. If an issue relative to Section 14 additional compensation exists, the Parties shall attempt to resolve same before the Deputy Commissioner.

5. Interest shall be paid on all accrued benefits at the rate of six percent per annum computed from the date each payment was originally due until paid.

6. The Respondent shall pay for or reimburse the Claimant for the reasonable cost of necessary medical care and treatment resulting from the May 21, 1978 injury, including the expenses incurred as a result of the medical treatment and hospitalization specifically found herein to be the responsibility of the Respondent.

7. The Respondent shall pay to Claimant's attorney, Joe M. Inabnett, the sum of $2,227.50 for his legal services and costs in connection with this case.

/s/Michaelle F. Pitard
Michaelle F. Pitard
Administrative Law Judge

Dated: July 18, 1981
New Orleans, Louisiana

MFP:jbm/4

CERTIFICATE OF FILING AND SERVICE

I certify that on July 21, 1981 the foregoing Decision and Order was filed in the Office of the Deputy Commissioner, Seventh District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Emile Smith, Rte. 2, Box 42, Biloxi, MS 39661
Claimant

Rogers Terminal and Shipping Corp., Room 500, 321 St. Charles Ave., New Orleans, LA 70130
Employer

GAB Business Services, Inc., P. O. Box 7091, Metairie, LA 70011
Insurance Carrier

Joe M. Inabnett, Esq., 1633 St. Charles Ave., New Orleans, LA 70130
Attorney for Claimant

Donald O. Collins, Esq., 225 Baronne St., Suite 2800, New Orleans, LA 70112
Attorney for Employer/Insurance Carrier

A copy was also mailed by regular mail to the following:

Judge Michaelle F. Pitard, Office of the Administrative Law Judges, U. S. Department of Labor, Suite 901, 1001 Howard Avenue, New Orleans, Louisiana 70113

Associate Solicitor of Labor for Employee Benefits, U. S. Department of Labor, Suite N-2716, NDOL, Washington, D. C. 20210

Director, Office of Workers' Compensation Programs (LHWCA), U. S. Department of Labor, Room S-3524, 200 Constitution Avenue, N.W., Washington, D. C. 20211

Glenn H. Woodley

Deputy Commissioner
Seventh Compensation District
U. S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Program

Supreme Court, U.S.
FILED
AUG 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2088

In the Supreme Court of the United States

OCTOBER TERM, 1986

ROGER'S TERMINAL AND SHIPPING CORPORATION,
PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an injured worker who has shown that he cannot perform his former job because of a job-related injury is entitled to compensation for a permanent total disability under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. II) 901 *et seq.*, where the employer has failed to produce any evidence that there are jobs available that the injured worker could secure and perform.

2. Whether substantial evidence supports the finding that the injured worker substantially complied with the requirements of Section 7(b)-(d) of the Act, 33 U.S.C. 907(b)-(d), for reimbursement of the medical expenses necessitated by his job-related injury.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 784 F.2d 687. The opinion of the Benefits Review Board (Pet. App. 15a-19a) is unreported. The administrative law judge's decision (Pet. App. 23a-31a) and order denying rehearing (Pet. App. 20a-22a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1986. The petition for a writ of certiorari was filed on June 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

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[1]Although the petition for a writ of certiorari cites 28 U.S.C. 2101(c) as the basis for jurisdiction, it is apparent that petitioner seeks to invoke the Court's jurisdiction under 28 U.S.C. 1254(1).

STATEMENT

1. On May 21, 1978, respondent Emile Smith, an employee of petitioner Roger's Terminal and Shipping Corporation, injured his back when he slipped and fell while loading grain into the hold of a ship (Pet. App. 3a). Immediately after the injury, and with petitioner's authorization, Smith received hospital emergency care and was released to return to work (*id.* at 4a, 10a, 25a). Continuing to experience pain, Smith several days later consulted a private physician, Vernon R. Kroll, M.D., at the recommendation of his attorney (*id.* at 3a, 25a). Dr. Kroll examined Smith on May 25 and six days later prepared a report that Smith hand-delivered on June 9 to petitioner's compensation claims adjuster (*id.* at 13a, 25a). That report advised that Smith continued to suffer from a lumbosacral back strain and was to return for follow-up care (*id.* at 25a). Petitioner's claims adjuster was further advised both by phone before June 9 (*id.* at 13a) and in writing (*id.* at 25a) that Smith continued to require treatment, and that Dr. Kroll planned to refer him to a neurosurgeon (*ibid.*). Smith requested payment for this consultation and treatment but petitioner refused to provide or authorize it (*id.* at 11a, 25a). Rather, it directed Smith to be evaluated by John Garoutte, M.D. (*id.* at 29a). As a result of his July 17 evaluation, Dr. Garoutte agreed that Smith suffered from chronic lumbar strain and concurred in Dr. Kroll's course of treatment, although he anticipated a gradual recovery (*id.* at 3a, 6a, 25a).

On July 21, the consulting neurosurgeon, Donald Richardson, M.D., examined Smith and scheduled further study of the back by myelogram (Pet. App. 25a-26a). The claims adjuster was advised that Smith would be hospitalized for this procedure (*ibid.*). The July 31 myelogram revealed a blunting of the nerve root at the L-5 level on the left with an extradural defect comparable with a small ruptured disc (*id.*

at 26a). A lumbar laminectomy with removal of the L-5 disc was performed on August 3 and Smith was released from the hospital a week later (*ibid.*).

Smith was discharged from further medical treatment in November 1978, having attained maximum medical improvement (Pet. App. 4a, 26a). His surgeon advised Smith that the condition of his back prevented him from doing heavy lifting (75 pounds or more) or repeated bending (*id.* at 17a, 26a). That month, Smith left New Orleans to live with family in Natchez, Mississippi (*ibid.*). He did not thereafter obtain further employment (*id.* at 26a). Respondent's employment history consists exclusively of work as a laborer and longshoreman (*id.* at 4a, 17a, 26a). He has a seventh grade education and cannot read or write (*ibid.*).

2. Smith applied for disability compensation benefits and for payment of his medical expenses under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. (& Supp. II) 901 *et seq.* (LHWCA or the Longshore Act). After a hearing and consideration of Smith's testimony and all the medical evidence presented, an administrative law judge (ALJ) found that Smith could not return to his job as a longshoreman as a result of his work-related injury (Pet. App. 4a, 28a). Accordingly, Smith had established a prima facie case of disability and the burden shifted to petitioner to offer evidence of the general availability of realistic job opportunities the claimant could perform (*id.* at 4a, 6a, 27a-28a). In determining the extent of respondent's disability, the ALJ applied the established principle under the Longshore Act that disability is an economic concept that cannot be measured by a claimant's physical or medical condition alone,[2] but must also encompass consideration of

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[2]The medical reports introduced by Smith and petitioner stated that Smith had suffered permanent disability, but differed on the degree of his physical impairment (Pet. App. 4a, 25a-27a). Smith's neurosurgeon, Dr. Richardson, reported that Smith would continue to have an

other factors such as age, education, employment history, and the availability of suitable employment (*id.* at 5a, 27a). Since petitioner had not come forward with any competent evidence of available, suitable jobs, the ALJ concluded that Smith was totally disabled " 'until such time as [Smith] is able to find alternative employment or [petitioner] comes forward with evidence establishing that there are suitable, realistic jobs available to [Smith]' " (*id.* at 4a-5a, 21a, 29a).

Regarding petitioner's contention that it should not be held liable for Smith's medical treatment because it did not approve it and did not receive timely reports, the ALJ found that while petitioner, at the hearing, asserted willingness to provide medical treatment through Dr. Garoutte, the evidence showed that it in fact had retained him only to evaluate Smith (Pet. App. 29a). Further, the record showed that it was "clear that demand was made upon [petitioner] for authorization for payment of medical services rendered to Mr. Smith which [petitioner] refused to do" (*ibid.*), and that petitioner's insurance claims adjuster was fully aware of respondent's initial private medical treatment and hospitalization (*ibid.*).

3. The Benefits Review Board affirmed the award of disability compensation payments and medical benefits (Pet. App. 15a-19a). It agreed with the ALJ's statement of the applicable legal standards and upheld as supported by substantial evidence the ALJ's finding that petitioner had not come forward with competent evidence of the availability of suitable alternate employment and therefore had not

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estimated disability of 15-20% of the body as a whole, while petitioner's physician, Dr. Garoutte, estimated a 20% disability of the lumbar spine (*ibid.*). A third physician, who evaluated Smith in June 1980 by joint agreement of the parties, concluded that Smith had a permanent impairment of 5-10% of the whole man (*id.* at 4a) and should avoid repeated bending or lifting, and pulling or pushing more than 75 pounds (*id.* at 4a, 26a-27a).

carried its burden (*id.* at 17a, 18a). The Board also affirmed the ALJ's findings that petitioner's authorization was requested for Smith's medical treatment (*ibid.*). It noted that the petitioner's selection of Dr. Garotte was not controlling since Smith had a right both to choose his attending physician under 33 U.S.C. 907(b), and to consult a specialist under 20 C.F.R. 702.406 (Pet. App. 18a n.4).

4. The court of appeals affirmed. On the issue of disability, the court relied on "settled law that '[t]he degree of disability is determined not only on the basis of physical condition but also on factors such as age, education, employment history, rehabilitative potential, and the availability of work that the claimant can do.' " Pet. App. 5a (quoting *New Orleans (Gulfwide) Stevedores* v. *Turner*, 661 F.2d 1031, 1037-1038 (5th Cir. 1981)), and citing *Odom Construction Co.* v. *Department of Labor*, 622 F. 2d 110, 115 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981), and *Diamond M. Drilling Co.* v. *Marshall*, 577 F.2d 1003, 1005-1006 (5th Cir. 1978). The court stated that this concept of disability, combined with the statutory (see 33 U.S.C. 920) and case-law presumption of coverage (Pet. App. 6a), results in the "generally stated" rule that once "a claimant establishes a prima facie case of disability by showing he cannot perform his former job because of job-related injury[,] * * * the burden shifts to the employer to establish the availability of other jobs that the claimant could perform" (*ibid.* (citing *New Orleans (Gulfwide)*, 661 F.2d at 1038, and *Odom*, 622 F.2d at 115)). The court agreed with the Benefits Review Board that substantial evidence supported the ALJ's findings that Smith was unable to return to his former job because of his injury, and that petitioner had failed to produce any competent evidence of available jobs that Smith could perform.[3] The court of appeals therefore affirmed the compensation award. Because petitioner

[3]The court of appeals (Pet. App. 8a), like the ALJ (*id.* at 21a) and the Board (*id.* at 18a), refused to accept as competent evidence petitioner's attorney's unsubstantiated assertion, repeated here (see Pet. 8), that jobs existed in the community that Smith could perform.

had "wholly failed to introduce any evidence on job availability" (Pet. App. 8a n.2), the court found it unnecessary to rule on petitioner's assertion that courts should use a "sliding scale" to "place an extremely light burden on the employer * * * where the claimant's disability is slight and a correspondingly heavier burden * * * where the claimant's disability is severe" (*ibid.*).

As to medical costs, the court held that Smith had a right to choose his own physician pursuant to 33 U.S.C. 907(b); that substantial evidence supported the finding that petitioner had refused to authorize medical service; that petitioner was fully aware of Smith's initial treatment and hospitalization and should have been aware that Smith's treatment might include surgery; and that there was no record evidence that the physicians who treated Smith were not approved providers of medical care (Pet. App. 10a-13a). The court also ruled that the actual delivery of Smith's first private physician's report of treatment 15 days following that treatment rather than ten days as required by statute (33 U.S.C. 907(d)) should be excused because the report was prepared within ten days of initial treatment, resulting in substantial compliance with the regulations, and because petitioner "suffered no prejudice from the minimal delay," having known of the injury at the outset and of the treatment even before the written report was received (Pet. App. 13a).

ARGUMENT

As petitioner acknowledges (Pet. 9, 13), the decision of the court of appeals regarding the determination of disability does not conflict with any decision of this Court or any other court of appeals. Indeed, the court below applied principles of law well established in other circuits as well as the Fifth Circuit, reviewed the evidence, and concluded that substantial evidence supported the ALJ's determination that the claimant was permanently and totally disabled

after November 24, 1978. The court's additional conclusions that substantial evidence supported the findings that petitioner had refused to authorize needed medical treatment and that late filing of a required report should be excused in the circumstances of this case are entirely fact-bound. The court's decision is correct and consistent with the purposes of the Longshore Act. Further review by this Court is therefore not warranted.

1. While petitioner does not contest the presumption that Smith suffered *some* disability (Pet. 12), it urges (*id.* at 13) that Smith should have been required to prove, before a permanent total disability may be presumed, that "his physical incapacity prohibits him from engaging in any employment and that he has made diligent attempts to procure some sort of remunerative employment." These proposed limitations on the presumption—and the correspondingly increased burden that petitioner proposes to place on claimants—would diverge from well-settled law based on the purposes of the Longshore Act.

In describing the burden of proof allocation, the court below followed principles adhered to not only in its own cases but also uniformly by the other circuits that have expressed their views. The rule generally stated is that when a claimant establishes a prima facie case of disability by showing that he cannot perform his former job because of a job-related injury, the burden shifts to the employer to show that there are other jobs available that the claimant could perform. *New Orleans (Gulfwide) Stevedores*, 661 F.2d at 1038, and cases cited therein. Accord, *Crum* v. *General Adjustment Bureau*, 738 F.2d 474, 479 (D.C. Cir. 1984); *American Stevedores, Inc.* v. *Salzano*, 538 F.2d 933, 935-936 (2d Cir. 1976); *McCabe* v. *Sun Shipbuilding & Dry Dock Co.*, 602 F.2d 59, 62 n.7 (3d Cir. 1979); *Newport News Shipbuilding* v. *Director, OWCP*, 592 F.2d 762, 765 (4th Cir. 1979); *Ridgley* v. *Ceres, Inc.*, 594 F.2d 1175, 1177-1178

(8th Cir. 1979); *Bumble Bee Seafoods* v. *Director, OWCP*, 629 F.2d 1327, 1329 (9th Cir. 1980).[4] Once the employer shows "employment opportunities * * * reasonably attainable and available" (Pet. App. 7a), a correlative burden arises for the employee to show "reasonable diligence in attempting to secure some type of alternate employment within the compass of employment opportunities shown by the employer" (*ibid.*). But "[t]his obligation to seek work does not alter the statutory presumption of coverage, nor the employer's initial burden of [proving] job availability" (*ibid.*, quoting *New Orleans (Gulfwide)*, 661 F.2d at 1043 (emphasis deleted)).[5]

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[4] *Air America, Inc.* v. *Director, OWCP*, 597 F.2d 773 (1st Cir. 1979), cited by petitioner as establishing a sliding scale of burdens of proof (Pet. 16-17), is irrelevant to this case. *Air America* involved the issue whether substantial evidence on the record as a whole—including evidence presented by the employer as to alternate employment the claimant could perform—supported an ALJ's finding of partial disability. Indeed, the court assumed that a presumption of disability had arisen, citing *American Stevedores, Inc.* v. *Salzano*, *supra*, as well as *Haughton Elevator Co.* v. *Lewis*, 572 F.2d 447, 451 (4th Cir. 1978), *Diamond M. Drilling Co.* v. *Marshall*, *supra*, and *Perini Corp.* v. *Heyde*, 306 F. Supp. 1321 (D.R.I. 1969), and enunciated a rule concerning the strength of the evidentiary showing that an employer must make to rebut the presumption of disability. Because petitioner here presented no evidence as to suitable alternative employment, *Air America* is inapposite.

[5] The court below correctly applied the law to the facts before it. Even though the undisputed evidence established Smith's incapacity to return to his former job, and even though existing decisions put petitioner clearly on notice that in the absence of anything further the disability would be found to be total, petitioner came forward with no evidence to show the general availability of suitable employment (Pet. App. 8a, 17a, 28a). Although petitioner contends (Pet. 10) that Smith lacked reasonable diligence in pursuing alternate employment, Smith's burden to show that he had sought alternate employment did not arise because of petitioner's failure to produce any evidence of available jobs. We note, moreover, that even if Smith did not complete job applications at the places where he inquired about work, as petitioner suggests (*ibid.*), that may be because Smith is unable to read or write (Pet. App. 26a).

This allocation of burdens is consistent with the structure and purposes of the Longshore Act. The central aim of the Act is to provide an injured worker with "compensation during the period of his illness or inability to pursue his usual employment * * *." H.R. Rep. 1767, 69th Cong., 2d Sess. 19-20 (1927). This Court has consistently held that its provisions "should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results." *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U.S. 408, 414 (1932). Accord, *Director, OWCP* v. *Perini North River Assoc.*, 459 U.S. 297, 315-316 (1983); *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 271 (1979); *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977); *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953).

Disability is defined in the Longshore Act as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10). The statutory scheme provides different amounts of compensation for four classes of disability based on the extent and permanence of the disability (33 U.S.C. 908) but does not provide explicit standards for determining the extent or duration of disabilities not specifically scheduled in the statute. The Act does, however, establish a presumption (33 U.S.C. 920(a)) that in the absence of substantial evidence to the contrary, a claim comes within the provisions of the Act.[6] This presumption has been construed to govern issues of the nature and extent of the injury as well as issues of whether a specific injury

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[6]Section 20, 33 U.S.C. 920, states in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (a) That the claim comes within the provisions of this Act.

falls within the Act's scope. *New Orleans (Gulfwide)*, 661 F.2d at 1038; *Duncanson-Harrelson Co.* v. *Director, OWCP*, 644 F.2d 827, 833 (9th Cir. 1981). Further, 33 U.S.C. 914(d) provides that an employer that disputes a claim for compensation must affirmatively set forth the grounds for contesting a claim, and 33 U.S.C. 922 permits an employer to apply for modification or termination of a compensation award because of changed circumstances. Both separately and cumulatively, these provisions establish congressional intent that a claim made under the Act will be presumptively credited unless the employer comes forward with substantial evidence to controvert it.

Moreover, this procedural allocation of the burden of coming forward with evidence is fair and reasonable, especially in light of the Longshore Act's compensatory purposes. When an employer concedes, as here, that a claimant has at least a partial disability, but proposes that there are some jobs which the claimant could secure and perform with his or her remaining ability, it is reasonable to require the employer, as the proponent of such a finding, at least to come forward with evidence of the availability of such jobs, before the claimant must show reasonable diligence in attempting to obtain such jobs.[7] See also 2 A. Larson, *The Law of Workmen's Compensation* § 57.61, at 10-164.95 to 10-164.113 (1983) (burden of proof allocation described here is sensible in light of the "well-known fact of modern economic life" that the demand for unskilled and semi-skilled labor is declining). Otherwise, injured workers would

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[7]This allocation of burdens is also entirely consistent with the rehabilitative purpose of returning an injured worker to the work force. That purpose can be fulfilled only if there are jobs available that the injured worker could perform. It is therefore reasonable to place on the employer the burden of coming forward with evidence of such jobs before requiring the worker to establish his or her inability to obtain such jobs.

be required to shoulder the "burden of proving a negative fact" (*New Orleans (Gulfwide)*, 661 F.2d at 1039 n. 13; *Bumble Bee Seafoods*, 629 F.2d at 1329), *i.e.*, the lack of suitable jobs, an almost impossible task. In sum, petitioner's contention that an injured worker incapable of returning to his former job should shoulder the additional burden of showing that "physical incapacity [prevents] him from engaging in any employment" (Pet. 13) is contrary to the statutory scheme and purposes and to the uniform course of decisions under the Act.

2. Petitioner's contentions (Pet. 17-21) that the court below improperly applied the requirements of Section 7(b)-(d) of the Act, 33 U.S.C. 907(b)-(d), regarding payment for medical services, are also without merit.

Petitioner contends (Pet. 17-18, 20) that the court of appeals erred in not requiring Smith to establish that the Secretary of Labor had specifically approved his physicians as qualified health care providers under the Act. This contention is insubstantial. Each of the physicians Smith consulted was a doctor of medicine (see Pet. App. 25a) as required by the pertinent regulation defining "physician" to include any "doctor of medicine (MD) * * * [operating] within the scope of their practice as defined by State law," and stating that "physicians in these categories are authorized by the Director to render medical care under the Act." 20 C.F.R. 702.404. Petitioner's assertion that there is a list of approved physicians from which Smith had to choose is simply without foundation.[8]

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[8]Prior to its amendment in 1984, the Act stated that the "Secretary *may* designate the physicians who are authorized to render medical care * * *." 33 U.S.C. 907(c) (emphasis added). The Secretary implemented the statute by the regulation quoted in text, but without issuing a separate list of authorized physicians. As amended, 33 U.S.C. (Supp. II) 907(c) provides that the "Secretary shall annually prepare a list of physicians and health care providers in each compensation district who are *not* authorized to render medical care" (emphasis added).

Petitioner's assertion (Pet. 6, 18-19) that Smith did not satisfy the requirements of Section 7(d) regarding obtaining an employer's prior authorization for medical or surgical services and filing a timely report raises entirely fact-bound questions not warranting further review. The ALJ specifically found that demand was made upon petitioner for authorization for payment of Smith's medical services but refused (Pet. App. 29a), and the court of appeals found this finding supported by substantial evidence (*id.* at 10a). Similarly, the ALJ found—and the court of appeals found supported by substantial evidence—that Dr. Kroll, Smith's first private physician, prepared the report within six days of his initial examination and that the claims adjuster received it 15 days after the initial consultation (*id.* at 13a, 25a). However, even before receiving the written report, petitioner had actual knowledge of both the injury and the treatment (*id.* at 10a-11a, 25a, 29a). Therefore, petitioner suffered no prejudice from the minimal delay in receiving the timely-prepared report (*id.* at 13a). Consequently, given the particular facts of this case, the court below appropriately concluded that the late filing was excusable. See 33 U.S.C. 907(d).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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